SUPREME COURT, U.S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 74-147

OCTOBER TERM, 1974

AAACON AUTO TRANSPORT, INC., Petitioner,

v.

HONORABLE MORRIS E. LASKER, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

AAACON AUTO TRANSPORT, INC., *Petitioner.*

v.

HONORABLE MORRIS E. LASKER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Aaacon Auto Transport, Inc., petitioners this Court for a Writ of Certiorari, to review the order of the United States Court of Appeals for the Second Circuit denying their petition for a Writ of Mandamus.

OPINIONS BELOW

In the case below, petitioner petitioned the United States District Court for the Southern District of New York for an order directing arbitration pursuant to 9 U.S.C. Section 4. The decision of the District Court, per Lasker, J., not

reported, denying petitioner's petition and holding said petition in abeyance, is set forth in Appendix No. 1. The endorsement of Judge Lasker denying petitioner's motion to reargue is set forth in Appendix No. 2. The letter of Judge Lasker, deferring action on respondent's motion to dismiss the petition is set forth in Appendix No. 3.

Petitioner thereafter filed a petition for a writ of mandamus in the United States Court of Appeals for the Second Circuit. The Order, without opinion, denying this petition is set forth in Appendix No. 4. The Orders, without opinion, denying petitioner's timely petition for reconsideration en banc are set forth in Appendix No. 5.

JURISDICTION

The Order of the Court of Appeals denying petitioner's timely petition for reconsideration of the Order denying petitioner's writ of mandamus was entered on July 1, 1974. Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit erred in denying the petition for a writ of mandamus directing the Honorable Morris E. Lasker to decide the case of *Aaacon Auto Transport, Inc. v. J. Wayland Thomas and Cora G. Thomas*, Civ. Action No. 71-3917;

2. Whether the judicial doctrine of primary jurisdiction can be invoked in a case involving the Federal Arbitration Act, where the doctrine appears to conflict with the judicial procedures mandated by Congress in 9 U.S.C. Section 4. This is a novel question of the first impression, and should be resolved by this Court;

3. Whether the invocation of the doctrine of primary jurisdiction violates due process of law, by denying petitioner's substantial rights granted by statute in 9 U.S.C. Section 4.

4. Whether the doctrine of primary jurisdiction can be invoked when the courts by previous decisions have already determined the issue to be referred.

STATUTES AND FEDERAL RULES INVOLVED

United States Code, Title 9, Section 4

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such

agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Federal Rules of Civil Procedure, Rule 81(a)(3)

(*a*) *To What Proceedings Applicable.*

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, §9 (44 Stat. 585), U.S.C., Title 45, §159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or

agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

STATEMENT OF THE CASE

There is now pending in the United States District Court for the Southern District of New York Civil Action No. 71-3917-MEL, entitled In The Matter Of The Arbitration Of Certain Differences Between AAACON AUTO TRANSPORT, INC., Petitioner and J. WAYLAND THOMAS and CORA G. THOMAS, Respondents.

Petitioner Aaacon Auto Transport Inc., (hereinafter "Aaacon") is a licensed motor carrier operating in interstate commerce throughout the continental United States. In February, 1971, J. W. Thomas and Aaacon entered into a written Bill of Lading Agreement to transport a vehicle belonging to the Thomases in interstate commerce. That agreement provided, inter alia, for the aribitration in New York City of any dispute arising between the parties. The pertinent part of the Bill of Lading Agreement reads:

> "Any claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or the performance or breach thereof, . . . shall be settled by arbitration in the City, County, and State of New York, . . ."

Thereafter, a dispute did arise concerning alleged damage to the vehicle during shipment. On August 31, 1971, Aaacon sought a determination of this dispute by arbitration and filed a petition to compel arbitration

pursuant to 9 U.S.C. Section 4 in the Federal District Court for the Southern District of New York.

The petition to compel arbitration was opposed by the real party in interest, Continental Insurance Co., in the name of the Thomases, on the primary ground that the arbitration provision in the agreement between the parties was in conflict with 49 U.S.C. 20(11).

The District Court, per Lasker, J., expressly found that "subject matter jurisdiction of the petition is vested in this Court . . . by 28 U.S.C. Section 1337 . . . accordingly this Court also has jurisdiction under 9 U.S.C. Section 4." However, Judge Lasker denied Aaacon's motion to compel arbitration and invoked the doctrine of primary jurisdiction, holding the petition in abeyance pending the outcome of an administrative proceeding in which Aaacon and the Interstate Commerce Commission were engaged, and in which, it was alleged, the validity of the arbitration provision in light of 49 U.S.C. Section 20(11) would be considered.

Subsequently Judge Lasker was incorrectly advised by respondents that an interim decision of a hearing examiner was a final decision of the Interstate Commerce Commission, and refused to reconsider the denial of Aaacon's motion to compel arbitration. He further suggested that respondents file a motion to dismiss the petition, which they did on December 18, 1973. However, on March 14, 1974, the Court noted its previous error, and held that it would also defer the action on respondents' motion to dismiss until the Interstate Commerce Commission had actually rendered a final decision.

The net effect of Judge Lasker's decision denying Aaacon's motion to compel arbitration and respondents'

motion to dismiss was to leave the case in abeyance and both parties in limbo pending a final decision of the Commission.[1]

Aaacon sought to review Judge Lasker's decision invoking the doctrine of primary jurisdiction, and staying the proceedings below, by petitioning the United States Court of Appeals for the Second Circuit for a writ of mandamus on April 30, 1974. This was denied on May 3, 1974. A timely petition for reconsideration en banc was subsequently made on May 16, 1974 and denied on July 1, 1974.

This case presents for review the refusal of the District

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[1] In this regard, Aaacon notes that the Commission had, by order of March 1971, commenced a proceeding involving Aaacon. Two and a half years thereafter, on November 30, 1973, the hearing examiner served an interim decision. This decision did not consider any of the evidence submitted by Aaacon which consisted of over 1,100 pages of testimony and over 150 exhibits which are now to be considered in full for the first time by the Interstate Commerce Commission. The interim decision did not cite any authority for its discussion of arbitration nor did it consider the prior Federal case law involving Aaacon and other carriers with regard thereto, although such authorities were present.

Additionally, Aaacon has requested from the Commission an opportunity to provide additional and new evidence in that proceeding which the Commission by Division 1 has indicated will be considered "after the entry of the initial decision (of the hearing examiner) in this matter". In light of the fact that the Commission proceedings have been in progress for over three years, that additional hearings are contemplated, and that a review of the entire record consisting of over 300 exhibits as well as over 2,000 pages of testimony will be had, it is not unlikely that a long period of time may elapse before a final determination is made by the Commission.

Moreover, nowhere in the original order of March 1971, or in any subsequent disclosure from the Commission, was it indicated that the question of arbitration was to be considered in this proceeding. Accordingly, it is doubtful whether the issue of arbitration is even properly before the Commission under the notice provisions of the Administrative Procedure Act, Section 558.

Court below to decide the issue before it, and the denial by the United States Court of Appeals for the Second Circuit of a writ of mandamus to compel the District Court to decide the issue, as required by 9 U.S.C. Section 4.

REASONS FOR GRANTING WRIT

I

THE DOCTRINE OF PRIMARY JURISDICTION IS IN OPEN CONFLICT WITH THE JUDICIAL PROCEDURES MANDATED BY CONGRESS IN THE FEDERAL ARBITRATION ACT.

Aaacon sought a review of Judge Lasker's decision below since it believes that the invokation of the doctrine of primary jurisdiction violates the provisions of 9 U.S.C. Section 4.

That section, in relevant part, authorizes the District Courts to direct parties to arbitrate after reviewing the agreement in question:

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

Congress has further mandated in Section 4 that the District courts shall proceed summarily to a trial of any

dispute concerning the validity of the arbitration agreement:

> "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be an issue, the court shall proceed summarily to the trial thereof."

Congress alone has the power to prescribe the rules of procedure in the District courts. *Livingston v. Storey*, 34 U.S. 632 (1835); *Locherty v. Philips*, 319 U.S. 182 (1942). Aaacon contends they have done so in the Federal Arbitration Act. In this regard, the Federal Rules of Civil Procedure are specifically superseded by the procedures set forth in 9 U.S.C. Section 4. Rule 81(a)(3) of the Federal Rules of Civil Procedure states:

> "In proceedings under Title 9 U.S.C. relating to arbitration, — these rules apply only to the extent that matters of procedure are not provided for in those statutes."

Thus, it is clear from the quoted language of 9 U.S.C. Section 4 that Congress has mandated that the Federal District Courts shall "proceed summarily" to a trial if there is any issue concerning the validity or the making of the agreement, as there is in the instant case.

Accordingly, the doctrine of primary jurisdiction—which is a procedure which contemplates a delay and suspension of judicial determination pending the advice of an administrative agency—violates the procedure mandated in 9 U.S.C. Section 4.

A review of the legislative history of the Federal

Arbitration Act, as well as its explicit language, demonstrate that the purpose of the Act was to make valid and enforceable agreements to arbitrate and to provide a summary trial if the making of an arbitration agreement was in issue.

Thus, in the House Report accompanying HR 646, the Federal Arbitration Act, *Report No. 96, 68th Congress, First Session*, Mr. Graham stated:

> "The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement . . . There is provided a method for the summary trial of any claim that no arbitration agreement was ever made, ... At the same time the party willing to perform this contract for arbitration is not subject to the delay and the costs of litigation. Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court."

It is, therefore, clear that not only the explicit language of 9 U.S.C. Section 4, but the legislative history of the Act as well, demonstrate a policy at odds with the delays and postponements inherent in the doctrine of primary jurisdiction.

Aaacon knows of no instance where the doctrine of primary jurisdiction has ever been invoked in a case involving the Federal Arbitration Act, 9 U.S.C. Section 4. Further, research has uncovered no case in which the doctrine of primary jurisdiction has been applied in the presence of statutory language directing the Court to

proceed summarily to a trial of an issue.

Aaacon believes that the issue herein is truly novel,and is a case of first impression calling for review by this Court.

The case at bar is readily distinguishable from *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411 (1959) cited by Judge Lasker below. That landmark case, which enunciated the present posture of the judicial doctrine of primary jurisdiction, did not concern itself with the impact of that doctrine on a Federal statute which mandates an entirely different procedure.

Aaacon respectfully suggests that *River Terminals* is not determinative of the issue at bar in the instant case, which is the inherent conflict between the judicial doctrine of primary jurisdiction and the Congressional mandate for a summary trial enunciated in 9 U.S.C. Section 4.

The closest analogous case that Aaacon has been able to uncover is *Mercury Motor Express, Inc. v. Brinke*, 475 F2d 1086 (5th Cir. 1973). There, the Court of Appeals for the Fifth Circuit held that the doctrine of primary jurisdiction could not be applied to a suit under 49 U.S.C. Section 1017(b)(2). Although the case was decided on several grounds, the Court looked to the legislative intention to provide for a speedy court trial of suits under that section. Unlike the instant case where the statute, 9 U.S.C. Section 4, is explicit on its face, the Court in the *Mercury* case was required to review the legislative history to find the statutory intent. The Court said at p. 1094:

> "An analysis of the purposes of the 1965 amendment which became the present Section

> 1017(b)(2) further confirms the inappropriateness of applying the primary jurisdiction doctrine in this type of litigation. A major purpose was to hasten enforcement procedures in cases of clear violations . . . Commenting on the 1965 amendment, Congressman Oren Harris, Chairman of the Committee, made clear the congressional intent to avoid delay in the procedure created and to provide a relatively speedy remedy:
>
> ' . . . We firmly believe this new enforcement tool will be a good one. It should not be subverted by any practice which will avoid or delay prompt settlement of the issues.' 111 Cong. Rec. 9679
>
> "Judicial application of the primary jurisdiction doctrine would re-route plaintiffs through administrative proceedings the amendment entitles them to avoid and permit a delay of precisely the type that Congress sought to eliminate in cases of clear violations."

In the *Mercury Motor* case the Court held that the doctrine of primary jurisdiction could not be applied since it would necessitate a delay which Congress intended to avoid in 49 U.S.C. Section 1017(b)(2). The instant case is even stronger since the express language of 9 U.S.C. Section 4 shows the legislative intent to avoid delay, even more clearly.

Judicial doctrines, no matter how helpful to the courts generally, cannot be invoked in the face of Congressional directives to the contrary. In an analogous situation, the Court of Appeals for the Second Circuit has recently held that another judicial doctrine—that of forum non

conveniens—could not be invoked in a case involving 9 U.S.C. Section 4, because the clear language of the statute, precluded the application of that doctrine. *Aaacon Auto Transport, Inc. v. Ninfo,* 490 F2d 83 (2d Cir. 1974).

Similarly, the clear language of that Section, in providing for a summary trial, likewise precludes the application of the judicial doctrine of primary jurisdiction, with its attendant delays.

Another decision which bears on this issue is *California v. Federal Power Commission,* 369 U.S. 482, 487-90 (1962). There, this Court considered a case involving the right of the Federal Power Commission to make a determination under the antitrust law where one of the parties had sought a determination in the courts. This Court held that the doctrine of primary jurisdiction has a reverse corollary—the courts may not await administrative advice where Congress had specified the courts should make the decision:

> "It is not for us to say that the complementary legislative policies reflected in Section 7 of the Clayton Act on the one hand and in Section 7 of the Natural Gas Act on the other should be better accommodated. Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. *Texas & Pac. R.R. v. Abilene Oil Co.*, 204 U.S. 426. The converse should also be true, lest the anti-trust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission."

The foregoing reasoning is directly applicable to the instant case. In 9 U.S.C. Section 4, Congress has directed the District courts to make determinations concerning the validity of arbitration agreements; this policy, mandated to the courts, should not be frustrated by a reference to an administrative agency. And the policy favoring arbitration, whose enforcement Congress has entrusted to the courts, should not be "taken over" by the Interstate Commerce Commission.

II

INVOCATION OF THE DOCTRINE OF PRIMARY JURISDICTION IN THE INSTANT CASE AND IN SIMILAR CASES CONSTITUTES A DENIAL OF DUE PROCESS OF LAW

The right granted in 9 U.S.C. Section 4 to a speedy trial on the issue of the making or validity of an arbitration agreement is an important substantive right created under the Federal Arbitration Act. In *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F2d 402 (2d Cir. 1959) the United States Court of Appeals for the Second Circuit, after stating at page 407 "To be sure much of the Act is purely procedural in character . . . ", further held that the Act also created substantive legal rights. The Court at page 409 stated:

> "we, therefore, hold that the Arbitration Act in making agreements to arbitrate 'valid, irrevocable and enforceable' created national substantive law . . . and that the rights thus created are to be adjudicated by the Federal courts whenever such courts have subject matter jurisdiction, ... We

> hold that the body of law thus created is substantive, not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce . . . "

This substantial rights of petitioner to a speedy trial has been completely obliterated by Judge Lasker's refusal to decide the issue, his stay of the proceedings and his preliminary referral to the Interstate Commerce Commission, with its attendant delays and suspension of judicial determination.

Whereas a referral to an administrative agency normally does not involve the deprivation of any rights to litigants, in cases under 9 U.S.C. Section 4 the issue is more complex. Here the stay and referral also eradicates the parties' statutory right to a speedy trial.

This ruling constitutes a denial of due process because the Congressional mandate for a speedy trial, once violated, cannot be resuscitated.

Furthermore, there is no right of appeal from the denial of a speedy trial provided for in 9 U.S.C. Section 4. The order staying the procedure below, pending the administrative referral, is a non-appealable interlocutory order. *Aaacon Auto Transport, Inc. v. Ninfo*, 490 F2d 83 (2d Cir. 1974).

And, no appeal will lie at any subsequent time from any final order in the case at bar, since once the matter has been stayed, and the referral to the administrative agency has occurred, and the Court has obtained advice from said

agency and issued a final order, any right of appeal, regarding the issue of delay, is rendered moot.

Thus, there is, in effect, no appeal at any time from Judge Lasker's invocation of the doctrine of primary jurisdiction or from his refusal to "proceed summarily to a trial" as required by statute.

Another reason why a referral to an administrative agency is improper and may constitute a denial of due process, is that 9 U.S.C. Section 4 provides for a jury trial on the issue of the making of an arbitration agreement. The statute clearly states that in those cases where a jury has been demanded that the jury shall decide the making of an arbitration provision. Clearly, it would violate due process of law for the court to deny a jury trial of the issue where permitted by statute and replace it, sua sponte, with an administrative referral.

Likewise, if a jury trial has not been demanded, it does not lessen the obligation of the court, sitting without jury, to hold a trial of this issue. 9 U.S.C. Section 4 states: "If no jury trial be demanded . . . the court shall hear and determine such issue". This language, taken in conjunction with the other language of this section stating: "If the making of an arbitration agreement . . . be in issue, the court shall proceed summarily to a trial thereof", shows clearly that an immediate trial shall be had, with or without jury, and that a referral to an agency violates the statute in either case.

III

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRENT PROBLEMS WITH RESPECT TO THE FEDERAL ARBITRATION ACT.

The Court below has decided an extremely important question of Federal law which has not been, but should be, settled by this Court. Does the statutory language and legislative intent of 9 U.S.C. Section 4 preclude a Court's invoking the doctrine of primary jurisdiction?

Furthermore, the issue is of extreme importance in the administration of the Federal Arbitration Act. If petitioner is correct, the doctrine of primary jurisdiction, if invoked, will always conflict with the Congressional mandate in 9 U.S.C. Section 4, as well as many other statutes, requiring a trial of a summary nature. To permit the application of the doctrine in such cases threatens the rights of all litigants to speedy trials where required by statute.

As indicated earlier, petitioner knows of no instance where the doctrine of primary jurisdiction has ever been invoked in relation to 9 U.S.C. Section 4. Thus, Judge Lasker's decision below appears to be the first instance where this has been attempted.

Petitioner respectfully submits that the court of first resort should not be the court of last resort on a question regarding substantial rights granted under a Federal statute.

Petitioner further believes that the denial of its petition for a writ of mandamus by the Court of Appeals was a

serious error since it leaves in effect a novel and important holding of the lower court without review, in an area of broad and recurrent application; a holding which is in apparent conflict with the Congressional mandate in 9 U.S.C. Section 4 that "the court proceed summarily to a trial".

Judge Lasker's decision renders ineffective this statutory mandate of a summary trial and opens a Pandora's box regarding the procedure to be followed under 9 U.S.C. Section 4 or similar statutes. Henceforth in any case involving interstate commerce, any litigant or any court, may defeat the very purpose of the Federal Arbitration Act by attacking the arbitration clause in question and obtaining, via the doctrine of primary jurisdiction, a referral to an administrative agency, with all its attendant delays.

Judge Lasker's decision threatens to create a substantial area of disorder in the administration of the Federal Arbitration Act and constitutes precedent for the extension and encroachment of a judicial procedural doctrine into an area that has already been preempted by Congress in 9 U.S.C. Section 4.

Further, as shown elsewhere in this petition, since no appeal will lie from the interlocutory stay order, and any appeal at a subsequent time will be rendered moot, it seems that the Appellate courts will never be able to review, in the ordinary course of appeal, a decision of the lower court staying the proceedings and invoking the doctrine of primary jurisdiction.

Petitioner respectfully submits that the decision of the District court below presents to this Court an important

novel question and an important matter of first impression which this Court should clarify before conflicts arise in the District courts regarding procedures to be followed under 9 U.S.C. Section 4.

IV

THE COURT BELOW SEEKS TO INVOKE A DOCTRINE OF ADMINISTRATIVE REVIEW OF JUDICIAL DECISIONS

The doctrine of primary jurisdiction is a procedure whereby courts in appropriate cases may obtain the advice of an administrative agency prior to deciding an issue. The ultimate responsibility, of course, remains with the court. *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411.

However, the Federal courts have already spoken with respect to the issue before the Court below. The validity and enforceability of this arbitration clause in Aaacon's bill of lading has been considered by the Federal courts on many occasions on the issues raised by respondents herein. In every instance the courts have unanimously upheld the provision in question.

It has been upheld by the United States Courts of Appeals for the Second and Third Circuits in *Aaacon Auto Transport, Inc. v. Levine*, 456 F2d 1335 (2d Cir. 1971); *Aaacon Auto Transport, Inc. v. Jacobson*, 475 F2d 1394 (3d Cir. 1973); *Aaacon Auto Transport, Inc. v. Ninfo*, 490 F2d 83 (2d Cir. 1974), citing with approval *Aaacon Auto Transport, Inc. v. Teafatiller*, 334 F. Supp. 1042 (SDNY 1971); and in innumerable cases before United States District Courts throughout the country.

Whenever the Federal courts have reviewed the arbitration provision in the bill of lading in question, it has been upheld without invoking the doctrine of primary jurisdiction, without reference to the Interstate Commerce Commission and without exception. The Court below, however, has refused to decide this very same issue until it receives advice from the Interstate Commerce Commission.

Aaacon respectfully submits that the very question Judge Lasker wishes to submit to the Interstate Commerce Commission has already been decided by the courts.

In the instant case, therefore, it would seem that Judge Lasker has not only invoked the doctrine of primary jurisdiction, but has, as well, invoked a doctrine of administrative review of previous judicial decisions—certainly a most dubious procedure.

Moreover, submission of this issue to an administrative agency could result in a decision which conflicts with prior court interpretations. It is the prior court decisions which must prevail. *Cory Corp. v. Sauber,* 266 F2d 58 (CA Ill 1959) rev'd other grounds 363 U.S. 709.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari to review the denial of the petition for a writ of mandamus.

Respectfully submitted,

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APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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71 Civ. 1917

In the Matter of the Arbitration of Certain Differences Between

AAACON AUTO TRANSPORT, INC.,

Petitioner,

-and-

J. WAYLAND THOMAS and CORA G. THOMAS,

Respondents.

MEMORANDUM

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LASKER, D.J.

Pursuant to 9 U.S.C. §4, petitioner, Aaacon Auto Transport ("Aaacon"), seeks to compel arbitration of differences between it and respondents arising out of the interstate transportation by Aaacon of respondent's car in the course of which the car was damaged. Respondents seek dismissal of the petition on the grounds that 1) this Court lacks subject matter jurisdiction; and 2) the bill of lading agreement which is the basis of the petition is invalid, because it is in conflict with the governing statute (49 U.S.C. §20(11), originally the Carmack Amendment) and the Interstate Commerce Commission ("I.C.C.") regulations promulgated thereunder.

The first ground must be rejected. Subject matter jurisdiction over the petition is vested in this Court without regard to amount in controversy by 28 U.S.C. §1337. *Peyton v. Railway Express Agency, Inc.*, 316 U.S. 350 (1942); *Bernstein Bros. Pipe and Machinery Co. v. Denver & R.G.W.R. Co.*, 193 F. 2d 441 (10th Cir. 1951); *Aaacon Auto Transport, Inc., v. Teafatiller*, 334 F. Supp. 1042 (S.D.N.Y. 1971). Accordingly, this Court also has jurisdiction under 9 U.S.C. §4.

This determination, however, is merely the beginning of the inquiry. Respondents contend that the bill of lading agreement between them and Aaacon is in conflict with the I.C.C.'s Uniform Straight Bill of Lading, promulgated pursuant to 49 U.S.C. §20(11), and the agency's other regulations governing the interstate transportation of motor vehicles in that it provides that the shipper consents to the jurisdiction of the New York courts together with personal service by mail and agrees to arbitrate all claims in the State of New York and in that, in a variety of ways, it

limits Aaacon's liability in case of loss of or damage to the vehicle. Aaacon argues the contrary, relying in part on the fact that its claims procedures have been filed with the Commission pursuant to its requirements and have not been repudiated by the Commission. Thus, the case is in a posture which is strikingly similar to the situation in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411 (1959), in which the Court held that before a district court strikes down a contractual relationship which is subject to I.C.C. control, the parties should be afforded an opportunity to obtain a preliminary determination of the issues involved from the agency. *Id.* at 421. The Court instructed that the district court proceeding should be held in abeyance pending the outcome of the agency determination. *Id.* at 421-22.

The Court held that this procedure should be followed regardless of the fact that the questions presented might ultimately require judicial determination. The Court stated:

> "We may assume that the question whether a clause of this kind offends against public policy is one appropriate ultimately for judicial rather than administrative resolution. But that does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction here involved is peculiarly well equipped to marshal and initially to evaluate." *Id.* at 420.

The Court quoted with approval the often cited passage in *Far East Conference v. United States*, 342 U.S. 570 (1952)

which states the reasons underlying judicial deference to administrative decision-making:

> "Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Id.* at 574-75; *accord, River Terminals, supra,* at 421.

These factors play as significant a role, here, as in *River Terminals,* and the rule enunciated in that case applies.

Unlike the parties in *River Terminals,* however, the litigants before us will not be obliged to commence an inevitably lengthy administrative proceeding as a result of this decision. A proceeding involving the same issues as are raised by this litigation has already been commenced against Aaacon by the Bureau of Enforcement of the I.C.C. and is, in fact, nearing completion. Respondents are willing merely to await its outcome without personally participating in it (affidavit of Nicholas LaGinestra, attorney for respondents, of February 8, 1973); Aaacon is, of course, a party to it and, therefore, is in a position to protect its interests before the agency.

Accordingly, we deny the motion to compel arbitration and hold the petition in abeyance pending the outcome of the I.C.C. proceedings.

It is so ordered.

Dated: New York, New York
June 14th, 1973.

s/ Morris E. Lasker
U.S.D.J.

APPENDIX 2

ENDORSEMENT

AAACON AUTO TRANSPORT v. J. WAYLAND THOMAS, 71 Civ. 3917

LASKER, D.J.

By memorandum dated June 14, 1973, we denied Respondents' motion to dismiss and Petitioner's motion to compel arbitration on the ground that decision of these motions should properly await the outcome of proceedings before the Interstate Commerce Commission. Petitioner informally moved to reargue. Subsequent to their application, the Commission rendered its decision, which upholds in every respect the contentions made by Respondents as to the invalidity of the bill of lading agreement on which the petition is based. No. MC-C-7287 (November 15, 1973).

While the Commission's decision supports our denial of Petitioner's motion to compel arbitration, it removes the reason for denying Respondents' motion to dismiss and we note that renewal of that motion would now be appropriate.

Petitioner's motion to reargue is denied.

It is so ordered.

Dated
New York, New York
December 10th, 1973.

MORRIS E. LASKER
U.S.D.J.

APPENDIX 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
NEW YORK, N.Y. 10007

Chambers of
JUDGE MORRIS E. LASKER

March 14th, 1974

TO: All Counsel

RE: Aaacon Auto Transport, Inc. v. J. Wayland Thomas and Cora G. Thomas 71 Civ. 3917

Since the decision rendered by the Administrative Law Judge of the Interstate Commerce Commission (No. MC-C-7287) is not a final determination by the Commission, we believe that it would be appropriate to defer action on defendants' motion to dismiss until such time as the Commission renders a final decision.

The parties are instructed to acquaint the Court with any further agency actions relevant to the case.

Sincerely,

s/Morris E. Lasker

MEL/cw
Zola and Zola, Esqs.
LaGinestra & Donnelly, Esqs.

APPENDIX 4

74-1548
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

In The Matter of
The Application of AAACON Auto Transport, Inc.,
Petitioner,

v.

Hon. Morris E. Lasker, United States District Judge for the Southern District of New York,
Respondent.

in the matter of the arbitration of certain differences between
Aaacon Auto Transport Inc.,
Petitioner,

v.

J. Wayland Thomas & Cora G. Thomas,
Respondents.

A petition for a writ of mandamus having been filed

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Further ordered that the Clerk shall serve a copy of this order on the Judge named respondent and on all other parties to the action in the trial court.

s/Sterry R. Waterman
Sterry R. Waterman

s/Henry J. Friendly
Henry J. Friendly

s/William H. Mulligan
William H. Mulligan

May 3, 1974

APPENDIX 5-a

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of July, one thousand nine hundred and seventy-four.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. WILLIAM H. MULLIGAN,

Circuit Judges.

74-1548

In the Matter of
The Application of Aaacon Autor Transport, Inc.,
Petitioner,

v.

Hon. Morris E. Lasker, United States District Judge for the Southern District of New York,
Respondent.

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX 5-b

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of July, one thousand nine hundred and seventy-four.

74-1548

In the Matter of
The Application of Aaacon Auto Transport, Inc.,
Petitioner,

v.

Hon. Morris E. Lasker, United States District Judge for the Southern District of New York,
Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

SUPREME COURT, U. S.

FILED

SEP 9 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-147

AAACON AUTO TRANSPORT, INC.,
Petitioner,

v.

HONORABLE MORRIS E. LASKER,
Respondent.

MEMORANDUM AS *AMICUS CURIAE.*

LAGINESTRA & DONNELLY,
By NICHOLAS M. LAGINESTRA,
Attorneys for J. Wayland Thomas and Cora G. Thomas, in the original action,
10 Platt Street,
New York, N. Y. 10038

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IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM, 1974.

AAACON AUTO TRANSPORT, Inc.,

Petitioner,

v.

HONORABLE MORRIS E. LASKER,

Respondent.

MEMORANDUM AS *AMICUS CURIAE.*

The writer, Nicholas M. LaGinestra, is the attorney appearing on page 23 of the petition as attorney for the respondent in the original action, the caption of which appears on the same page (LaGinestra & Donnelly).

Questions Presented.

Under the Questions Presented of the petition, Mr. Zola neglected to state the *main* question. Mr. Zola neglected to tell this Honorable Court that he, as attorney for AAACON, I, as attorney for the respondent in the original action as it appears on page 23, to wit, J. Wayland Thomas and Cora G. Thomas, and the Honorable Judge Lasker agreed in the judge's chambers in the presence of each other than the Honorable Judge Lasker would withhold any decision pending the decision by the I.C.C., since it was the contention of the respondent, whom I represented, that the bill of lading in question was issued by Mr. Zola's client in violation of I.C.C. laws, rules and regulations.

The question presented to this court, therefore, is whether Mr. Zola, acting as attorney and vice-president of AAACON, the petitioner, should repudiate that agreement when the Honorable Judge Lasker, in conformity therewith, issued his memorandum of June 14, 1972.

Substantiating my contention herein I attach hereto copy of a letter dated December 12, 1973, addressed to the Honorable Morris E. Lasker by Mr. Zola. I call specific attention to the last paragraph of that letter where it says:

> "Accordingly, we respectfully request that your Memorandum Endorsement be recalled and reconsidered and that in accordance with your original Memorandum dated June 14, 1973, that the matter be held in abeyance until the Commission renders its decision and that decision becomes final."

I fail to see how Mr. Zola can blow hot and cold at the same time, asking the Honorable Judge Lasker to withhold the decision and then bringing a mandamus proceeding.

I, therefore, call the attention of this court to this most important fact, which in itself should deny the petition for a writ of certiorari. Once Mr. Zola agreed with the Honorable Judge Lasker and myself, he should be made to stand by the agreement.

Further Reasons for Denying the Petition.

Mr. Zola fails to attach the bill of lading which is in controversy in the original case. An examination of the bill of lading will indicate to this court that the I.C.C. Administrative Judge upheld my contentions *in toto*. Mr. Zola also filed exceptions to the findings of the Administrative Judge of the I.C.C. The bill of lading is against the

I.C.C. regulations in that it requires arbitration in New York City, New York County and New York State by a shipper in any claim or controversy founded in contract or tort (please see p. 5 of the petition). Arbitration is not against I.C.C. regulations nor against court regulations if it is done to PROMOTE JUSTICE AND AVOID LITIGATION. In this case where the petitioner does business throughout the United States, it is certainly unjust to require a shipper from Oregon or California to come to New York with his mechanic and witnesses to arbitrate a $700 claim when the contract was not entered into in New York state, neither the shipper nor the witnesses reside in New York, the accident never occurred in New York, and the shipment destined for Oregon originated in Florida. This would require a shipper to spend many times the amount of the loss to recover the loss. This clause is not put in the bill of lading for the purpose of avoiding litigation and doing justice; it is put in the bill of lading for the *only purpose* of avoiding liability and obligation to pay on the part of Mr. Zola's client by making unrealistic the enforcement of the claim. I ask this court to conceive the hundreds of losses involving millions of dollars in the aggregate but individually in amounts where it does not pay for the shipper to come to New York and enforce payment of the claim, and all of which inures to the benefit of Mr. Zola's client. This has been determined by the Administrative Judge of the I.C.C. to be against their rules in protecting the rights of the shipper.

A further reason for denying this petition is that the bill of lading which Mr. Zola failed to attach to the petition substantially states that if the shipper recovers from his insurance carrier, the payment by the insurance carrier to the shipper inures to the benefit of Mr. Zola's client and, further, the shipper cannot assign the claim. Such losses will tend to increase the premiums of the shippers and other persons so that everyone pays for the losses ex-

cept Mr. Zola's clients, who benefit by it. To better state the fact is that they deny subrogation and are using the people's money to satisfy their client's obligations to their shipper. This has also been found to be contrary to I.C.C. regulations, as is evidenced by the findings of the I.C.C. and the orders attached in the original file of this case.

A further ground for rejection of this petition is that there is a further illegal provision in the bill of lading to the effect that, regardless of what the law is, the arbitrator is to abide by the terms of the bill of lading regardless of its illegality. In other words, Mr. Zola's client makes the law applicable to its case, chooses the place where it is to be decided and limits the arbitrator to what decision he has to make. In other words, the arbitrator is nothing but a "robot."

This does not conform to the I.C.C. rules and regulations, and I respectfully refer this court to the findings of the Administrative Judge.

Conclusion.

For the foregoing reasons: (1) agreement by Mr. Zola to have the Honorable Judge Lasker hold any opinion until the final I. C. C. ruling, (2) repetition of that request in the letter of Mr. Zola, hereto attached, (3) the fact that the bill of lading is in violation and has been found in violation of I.C.C. rules and regulations by the Administrative Law Judge, this petition should be dismissed.

Respectfully submitted,

LaGINESTRA & DONNELLY,
By NICHOLAS M. LaGINESTRA,
Attorneys for J. Wayland Thomas and Cora G. Thomas, in the original action.

APPENDIX.

Bill of Lading Agreement.

E. 1780

AAACON AUTO TRANSPORT, INC.

BILL OF LADING AGREEMENT

Pick Up Date 2/11/71

Estimated Due Date 2/18/71

Pick Up Car From J. W. Thomas 306-14th Ave., N. E.. St. Petersburg, Fla. Phone 894-8556

Consignee Mr. J. W. Thomas 814 Liberty Road Duquesne, Pa. Phone (412) 466-8445

Registered Car Owner (Shipper) James W./Cora G. Thomas

Registered Address 814 Liberty Ave.

City & State Duquesne, Pa.

Car Make Chrysler

Type Imperial

Model Doors 4

License # AO3627, Pa.

Automatic Trans. yes

Power Brakes yes

Power Steering yes

Serial # A16175905

Condition Report

√ Good—F Fair—B Broken—C Cracked—D Dented—S Scratched—P Pitted—X Missing

RF Fender	√	R Window	√
Front Bumper	√	Tire Jack	√
Front Grille	√	Spare Tire-Wheel	√
Front Lights	√	R Lights	√
Hood	√	RR Panel	√
Windshield	√	RR Window	√
LF Fender	P	RR Door	P
RF Vent Window	√	R Body Sill	√
LF Vent Window	√	RF Window	√
LF Window	√	RF Door	√
LF Door	P	Roof	√
L Body Sill	√	Hub Caps	4
LR Window	√	Radio	√
LR Door	P	Heater	√
LR Panel	P	Upholstery	√
Trunk Lid	P	Keys	2
R Bumper	√	RR Fender	X
		LR Fender	X

Luggage in Trunk Only listed on order form.
All very minor.

Shipper guarantees the operating and mechanical condition of the herein mentioned vehicle during transport, and assumes all responsibilities for damage and all liabilities arising therefrom. Regardless of cause, carrier shall not be liable for any damages or consequences from or for any delay in delivery, any rental of substitute vehicle, any mechanical defect occurring during shipment, or any excess mileage. Shipper agrees that driver is an independent contrator and that driver may make any necessary repairs to said vehicle of less than twenty dollars without shipper's consent and repairs in excess of twenty

dollars with shipper's prior consent. Shipper shall pay for all said repairs. In the event of damage or loss to said vehicle, shipper shall retain all or part of driver's fee required to pay for same; or, if said damage or loss shall exceed driver's fee, shipper shall forward driver's fee, constituting final freight bill payment due, to carrier within seven days after said damage or loss occurs. Payment to driver by shipper or shipper's agent shall constitute conclusive evidence of satisfactory delivery of vehicle. Retention of driver's fee, at shipper's option, beyond said seven day period shall constitute conclusive evidence of full settlement and satisfaction of any claims against carrier by shipper and shipper's assigns. This Bill of Lading and any shipment hereunder shall not operate as a waiver or avoidance of any contract of indemnity which shipper effected prior hereto or the obligations thereunder which shall devolve primarily upon the indemnitor and said contract of indemnity shall be and remain in full force and effect. Unless a greater value is declared thereon above, shipper agrees that the declared value of all personal property in the vehicle is under fifty dollars and hereby releases carrier from all obligations for loss or damage thereto in excess of fifty dollars. All terms and conditions of the Uniform Straight Bill of Lading, a copy of which is available to shipper and driver at the office of carrier, are included herein by reference and made a part hereof. Any notice required under said Uniform Straight Bill of Lading shall be invalid and void unless personally signed by and forwarded by the shipper to carrier. *The shipper shall commence any legal action necessary to mitigate or recover damages from any third party responsible, or any source liable, therefor. Any recovery by, or satisfaction of said damages to, shipper from any source liable or responsible to shipper therefor, shall, to the extent thereof, operate and constitute a discharge and release of said claims against carrier by ship-*

per and shipper's assigns. Driver alone shall be responsible for all violations of law during the time that the vehicle is in his possession. *Driver and shipper consent to the personal jurisdiction of the courts of the State of New York and to service of process upon driver or shipper for the commencement of any action in connection herewith by certified mail addressed to his last known address* within the United States. This Bill of Lading agreement supersedes all prior written or oral representations of carrier and constitutes the entire agreement between shipper and carrier and shipper and driver and may not be changed except in writing signed by an officer of carrier. This Bill of Lading agreement shall be deemed executed by the carrier at its principal office in New York City. *Any claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or the performance or breach thereof, is non-assignable and shall be settled by arbitration in the City, County, and State of New York, provided however, that upon such arbitration the arbitrator(s) shall be bound by, and may not vary or modify, the provisions of this Bill of Lading agreement and shall, at the request of any party thereto, apply the rules and laws of evidence that would otherwise apply in a court of proper jurisdiction.*

Picked up in the Above Condition Except as Noted

Shipper or Shipper's Agent X J. W. Thomas

Driver James T. Boulger

Date 2/15/71

Delivered in the Above Condition Except as Noted

Consignee (Shipper's Agent) X

Driver Received Full Payment

Date

Total Payment Due at Destination $50.00 only, in cash to Driver when car is delivered in Satisfactory Condition.

Driver shall purchase permits in Arizona, New Mexico and Nevada where required by Law.

Driver Destination

Name James T. Boulger

Address Rt. 1

City Chillicothe, Ohio

Phone 993-2625

St. Petersburg
2422 Central Ave.
896-4634

(Italics mine.)

Letter, Dated December 12, 1973 (Zola and Zola to Honorable Morris E. Lasker).

ZOLA AND ZOLA

COUNSELLORS AT LAW

228 West 41st Street

New York, New York 10036

December 12, 1973

Honorable Morris E. Lasker
Judge, United States District Court
Federal Courthouse
Foley Square
New York, New York 10007

Re: Aaacon Auto Transport, Inc.
v. Thomas

Honorable Sir:

I have this day spoken with Miss Martin of your office concerning your Endorsement Decision of December 10, 1973. I informed her that the language therein indicating that "the Commission rendered its decision" concerning the invalidity of the bill of lading agreement is incorrect.

All that has been issued is a report of a *hearing examiner* which reviews the facts and makes *proposed* findings which are in no way binding upon the Commission.

The hearing examiner is required by law to draft a form of proposed order, which is contained on pages 13 through 16 thereof. This is *not* a final order of the Commission, which will review the facts and law *de novo* before rendering its decision. It has not yet rendered a decision.

Parenthetically we note that the hearing examiner's decision omitted any reference to *any* of the 156 exhibits and 7 witnesses presented by Aaacon and *solely* summarized the case of the Bureau of Enforcement. The Commission itself may do otherwise.

Accordingly, we respectfully request that your Memorandum Endorsement be recalled and reconsidered and that in accordance with your original Memorandum dated June 14, 1973, that the matter be held in abeyance until the Commission renders its decision and that decision becomes final.

Respectfully submitted,

ZOLA AND ZOLA
/s/ RALPH J. ZOLA

RJZ:be

cc: LaGinestra and Donnelly, Esqs.
10 Platt Street
New York, New York 10038

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SUPREME COURT

FILE
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

No. 74-147

OCTOBER TERM, 1974

AAACON AUTO TRANSPORT, INC.,

Petitioner,

v.

HONORABLE MORRIS E. LASKER,

Respondent.

REPLY TO THE MEMORANDUM AMICUS RURIAE.

RICHARD S. KAPLAN
Attorney for Petitioner
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-147

AAACON AUTO TRANSPORT, INC., *Petitioner,*

v.

HONORABLE MORRIS E. LASKER, *Respondent.*

REPLY TO THE MEMORANDUM AMICUS CURIAE

INTRODUCTORY COMMENT

Petitioner's Reply Memorandum is submitted in response to the Memorandum Amicus Curiae filed by Nicholas LaGinestra, Esq., of LaGinestra & Donnelly, attorneys for J. Wayland Thomas and Cora G. Thomas, respondents below. Although the Memorandum Amicus contains no legal authorities and does not address itself to the issue before this Court—the question of the propriety of issuance of a writ of mandamus—petitioner nevertheless feels constrained to reply thereto to correct certain distortions contained therein.

THE MEMORANDUM AMICUS IS IN ERROR CONCERNING THE EVENTS SUBSEQUENT TO JUDGE LASKER'S DECISION INVOKING THE DOCTRINE OF PRIMARY JURISDICTION

The Memorandum Amicus, no doubt through an inadvertence, misrepresents the facts subsequent to Judge Lasker's decision invoking the doctrine of primary jurisdiction. The facts, which are set forth more fully in the Petition for Writ of Certiorari, are that subsequent to his original decision of June 14, 1973, (Appendix 1 of Petition for Writ of Certiorari), Judge Lasker had been misinformed by LaGinestra & Donnelly that the Interstate Commerce Commission had rendered a decision adverse to petitioner, Aaacon Auto Transport, Inc. This was incorrect. The true facts were that the Commission had not rendered a decision. Merely, a hearing examiner had issued a summary of evidence which he forwarded to the Commission for its review of the facts de novo, pursuant to the provisions of the Administrative Procedure Act. No decision thereon has ever been rendered by the Commission, although the proceeding has been in progress for over three and a half years.

However, based on that misinformation, Judge Lasker issued a Memorandum Endorsement of December 10, 1973, dismissing Petitioner's petition below. (Appendix 2 of Petition for Writ of Certiorari). This led to the letter of Ralph Zola, Esq., of December 12, 1973, which is reproduced in the Memorandum Amicus. A reading of the

full text of that letter, rather than the small portion excerpted in the body of the Memorandum Amicus, indicates that the writer was not agreeing to be bound by the prior decision of Judge Lasker of June 14, 1973 (in which Judge Lasker invoked the doctrine of primary jurisdiction). Rather, in that letter, Petitioner therein set forth the true facts, noted above, concerning the status of the proceeding before the Commission, and informed Judge Lasker that he had been wrongfully advised by LaGinestra & Donnelly. Petitioner requested that the decision of Judge Lasker, which was based upon this misinformation, be reconsidered. Accordingly, thereafter, on March 14, 1974, Judge Lasker wrote a letter acknowledging this error and restoring the effect of the prior decision of June 14, 1973. (Appendix 3 of Petition for Writ of Certiorari).

At no time did Aaacon Auto Transport, Inc., or its attorneys, agree to a stay of determination of the petition below on the basis of the doctrine of primary jurisdiction or otherwise. The sole agreement that Judge Lasker sought was the single commitment from LaGinestra & Donnelly that a prior action commenced by respondents below in the courts of Pennsylvania, be held in abeyance pending an ultimate determination by the New York District Court of Petitioner's petition below.

THE OTHER ISSUES RAISED IN THE MEMORANDUM AMICUS ARE BOTH ERRONEOUS AND IRRELEVANT TO THE ISSUE BEFORE THIS COURT

Similarly, the other issues raised in the Memorandum Amicus are not germane to the determination by this Court as to whether a Writ of Mandamus should be issued directing Judge Lasker to make a decision in the case below. Rather, the matters raised in the Memorandum Amicus are more appropriately addressed to a determination by Judge Lasker, should he be required to act.

However, to complete the record, Aaacon must respectfully note that the lawfulness and validity of the exact arbitration provision contained in Aaacon's Bill of Lading has been sustained on many occasions by Federal courts throughout the United States, including the Second and Third Circuit Courts of Appeal. Thus, in *Aaacon v. Jacobsen*, 475 F2d 1394 (3rd Cir. 1973) and *Aaacon v. Levine*, 1456 F2d 1335 (2nd Cir. 1971), both Courts of Appeal affirmed orders of the U.S. District Court specifically upholding the lawfulness and validity of the arbitration provision here in question. Cf. *Aaacon v. Teafatiller*, 334 F. Supp. 1042 (SDNY, 1971).

Regarding arbitration in New York, this places no burden whatsoever on the parties where, as here, the real party in interest is an insurance company with offices and counsel in New York. And further, arbitration may be had

speedily and inexpensively on documents alone, without the necessity of either party traveling, obtaining counsel, appearing personally or having witnesses appear personally, when they reside more than 100 miles away. Cf. New York Civil Practice Law and Rules, Sec. 3117. This procedure has been followed in *Aaacon v. Gale,* Docket # 72 Civ. 239 (SDNY, 1972) per Frankel, J.

In this regard, the Interstate Commerce Commission itself has proposed legislation requiring arbitration of all shipper claims. *Ex Parte 263,* 340 ICC 515, 595 (1972):

> "The mechanics of an operation (arbitration) of such national scope are not clearly as staggering as they might first appear. The vast majority of loss and damage claims can be resolved on the basis of the documentary evidence . . . . "

Regarding the issue of the enforcement of the terms of the bill of lading agreement in arbitration, Aaacon respectfully notes that the terms of the bill of lading are dehors the record and not germane to the question of the issuance of a writ of mandamus. However, it is respectfully observed that the bill of lading recites pertinent portions of the federal law applicable to the interstate carriage of goods. Thus, determination by arbitration is required to be in conformity with the federal law governing the interstate transportation of goods. In this regard, the Interstate Commerce Commission itself, in commending arbitration of shipper claims, has stated that arbitration must be had in accordance with federal carrier law. *Ex Parte 263,* 340 ICC 515, 582 (1972).

Finally, LaGinestra & Donnelly's assertions concerning benefit of insurance and the rights of their client, the insurer, are also erroneous, dehors the record and not germane to the issue before this Court. However, Petitioner respectfully notes that automobile driveaway carriers, such as the petitioner herein, are entitled to the benefit of insurance effected upon the vehicle, both under the provisions of the Uniform Straight Bill of Lading and under the authority of a recent decision by the Seventh Circuit Court of Appeals in *United States v. Auto Driveaway*, 464 F2d 1380 (7th Cir. 1972). In that case, the Court noted that driveaway carriers of automobiles, such as petitioner, are entitled to the benefit of insurance on the vehicles because of the unusual nature of the commodity being shipped: private automobiles which are insured prior to transport. The Seventh Circuit noted that, what distinguishes these vehicles from other cargo in interstate movement, was the fact that the vehicles had been insured by the shippers thereof for their own general purposes, and not for transportation. Cf. *Phoenix Insurance Co. v. Erie Transportation Co.*, 117 U.S. 312; *Luckenback v. McCahon Sugar Ref. Co.*, 248 U.S. 139. The provisions concerning insurance in the instant bill of lading agreement do not prevent subrogation, but rather, mitigate the shipper's damages by the amount of the insurance proceeds insofar as it does not void the policy.

Petitioner respectfully reiterates that the foregoing considerations are not germane to the legal issue before this Court, and are only relevant for consideration by Judge Lasker, should he be required to act.

CONCLUSION

For the reasons previously stated in the Petition, the Court should grant the Petition for a Writ of Certiorari to review the denial of the Petition for a Writ of Mandamus.

Respectfully submitted,

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